IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.428 OF 2003

Sunil Shrinivas Vaidya .. Petitioner
Versus
State of Maharashtra & Ors. .. Respondents

Mr.Sagar kadam with Mr.Mustafa Kachwala i/b. S.Mahomedbhai & Co. for petitioner
Ms.Bharati Narichania i/b. Vibha Juriconsult & Co. for respondent No.3 Mr.Mihir Gheewala for respondent No.2
Mr.R.Y.Mirza, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 1st December 2005.

P.C.

. This petition under Article 227 read with Section 482 of Cr.P.C. challenges an order passed by the learned sessions Judge in Criminal Revision Application No.271 of 2001 and Criminal Revision Application No.361 of 2001. By her

order dated 11th October 2002, learned Sessions Judge was pleased to allow Criminal Revision Application No.361 of 2001 and reject the Criminal Revision Application No.271 of 2001.

2. Criminal Revision Application No.271 of 2001 is at the instance of present petitioner who is original complainant whereas Criminal Revision Application No.361 of 2001 is at the instance of the accused who has been impleaded as accused No.2 in the said criminal case.

3. Petitioner is the Manager of Union Bank of India which has instituted aforesaid criminal case. It appears from a perusal thereof that the bank had extended certain facilities to a sole proprietorship firm viz., Mehul Exports. Sole proprietor of the said firm Mr.Nirmal Kumar Agarwal is arrayed as accused No.2 in the complaint. Averment in the complaint is that accused No.1 represented to the bank that he had

confirmed sale contracts for export of readymade garments. One of the purchaser abroad is identified as M/s.Selen Moscow. Accused No.1 approached the bank with a plea that he required finance for fulfilling his export obligations. Packing Credit facility was granted at his request to enable him to acquire the said garments. A sum of Rs.12,49,95,254.66 was advanced to the accused No.1. It is the case of the bank that he executed packing credit agreement on 2nd May 1996 and 26th March 1997. Placing reliance upon the clauses in the said agreement and more particularly clause 4, Complaint alleges that monies were held by the said accused as Trustee for and on behalf of the bank. It was specifically undertaken that in case the goods are awaiting shipment abroad and until bill of lading and all accompanying documents were handed over, the monies would be held in Trust for the bank and the bank shall be entitled to call on the said accused at its

discretion to hand over the same. Further, it is alleged that the complainant was to receive monies from out of the sale proceeds of the goods shipped abroad. Complainant, therefore, granted a foreign documentary bill purchase facility. After referring to the obligations under the said facility it is contended that the accused No.1 exported and shipped a consignment of T-Shirts to one party in Singapore. In respect of this consignment services of accused No.2 and 3 were availed off. It is alleged that the original bill of lading was handed over to the accused No.1 as constituting valuable security of complainant bank. It is alleged that by virtue of the clause in the undertaking and the agreement, the bank alone was entitled to give directions to the shipping company regarding delivery of the goods to the consignee. All that is alleged against other accused (2 and 3) is that prior to the delivery of the goods, they had to ensure that valuable security of the bill of

lading was duly discharged. It is alleged that the original bill of lading must be surrendered duly endorsed in exchange for the goods or the delivery order in respect thereof. It is alleged that the bill of lading was in the possession and custody of complainant bank. It is alleged that after handing over the original bills of lading in respect of four consignment which were delivered through accused Nos. 2 and 3, the bank in pursuance of the contractual obligations undertaken, forwarded respective bills of lading and bills of exchange to the bankers of the consignees for payment. Consignees did not accept bills of exchange for payment. Original bills of lading were returned back to the banker and that is how they are in the custody of bank. It is then alleged that on 19th May 1999 the complainant learnt that accused Nos. 2 and 3 in collusion and connivance with the accused No.1 allowed delivery of the case covered by the 4 bills of lading to respective consignees thereof

without discharge/ cancellation of the original bills of lading which are in the custody of the complainant bank. It is alleged that the goods were entrusted to the accused and they were to hold the same as trustees of the complainant. The accused gave delivery of the said goods in violation of the direction contained in the bills of lading.

4. As far as the averments in the complaint pertaining to accused No.1 are concerned, it is not disputed that the same disclose commission of criminal offence, prima facie, by the said accused. However, it is the grievance of complainant bank that necessary averments in order to constitute an offence not only of criminal breach of trust but mis-appropriation and cheating are set out in the complaint against other accused as well. Prima facie, the complaint discloses commission of the said offences and, therefore, the application for

discharging other accused should not have been entertained by the learned Magistrate as also the sessions Judge.

5. Mr.Kadam, learned Counsel appearing for petitioner contended that the bill of lading in this case had a specific clause, stating that the goods will not be delivered unless original is surrendered duly endorsed. There is a stamp of third respondent on the said bill of lading and at the foot thereof it contains undertaking that the original bill of lading must be surrendered duly endorsed in exchange for the goods or the delivery order. Delivery of this consignment is handed over in breach of undertaking by accused Nos. 2 and 3. Bill of lading is admittedly in custody of petitioner bank. He contended that once there is a legal contract which contains a stipulation and undertaking as above, then, in contravention of the same if property entrusted, has been delivered, then ingrediants constituting

offence of criminal breach of trust are satisfied. The courts below, therefore, were in serious error in discharging the accused. He states that the orders suffer from apparent error on the face of the record. He submits that courts below should not have arrived at a final conclusion at prima facie stage. Hence, this is a fit case for intervention by this Court in its powers conferred vide Article 227 of Constitution of India as well as section 482 of Cr.P.C.

6. With the able assistance of the learned Counsel I have perused the complaint, relevant documents, application for discharge and the orders passed thereon. In my view, while it is true that the reliance placed on a decision of this Court reported in A.I.R. 1999 Bom. 4001 by the learned Magistrate was misplaced as that case and the observations made therein must be seen in the backdrop of a civil transaction, yet, as far as, the accused Nos. 2 and 3 are concerned,

averments in the complaint do not spell out offences as alleged.

7. At the stage of discharge, it is assumed that the complaint allegations are true and correct. The matter normally and ordinarily is argued on the basis of demurer. Taking the complaint at its face value, it has to be demonstrated that it does not disclose any offence and that is how applications of discharge are made and considered. In the present facts and circumstances, I am of the view that the courts below have not committed any error in holding that the complaint does not disclose any offence against accused Nos. 2 and 3. Admittedly, the accused herein, are no local Agents of a Foreign shipping company. Goods are booked by the local agent for and on behalf of the foreign shipping company and it is the foreign shipping company which is entrusted with them for the purpose of delivery. As far as

local agent is concerned, it is engaged solely for booking goods and loading them for shipment abroad. Their liability being as such and in the present case, neither the agent nor the shipping company having given any undertaking, it could not be said that the property was entrusted to them or they had any dominian over the same. Courts below were therefore right in their conclusion that as far as present case is concerned, ingredients of section 406 are hopelessly lacking against Accused Nos. 2 and 3.. Complaint is also perused for finding out whether other offences alleged viz., cheating and misappropriation are made out or not. Even that conclusion is just and proper and rightly not assailed before me. For the limited purpose of finding out as to whether process could be issued under section 406 or whether accused deserve to be discharged even on that count, that the order and materials were perused by me. The learned Sessions Judge in paras 8 and 9 of the impugned

order has rightly held that no offences are disclosed as far as accused Nos. 2 and 3 are concerned.

8. Having found that the said conclusion is in confirmity with the averments and allegations in the complaint, this is not a fit case for interference by this Court. Once, this conclusion is reached, in my view, the decisions

brought to my notice by Mr.Kadam viz., J.T. 1999 (6) SC 618 (Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors) and of this Court in 1989(1) BCR 467 (M/s.Daga Enterprises and Ors. Vs. The State of Maharashtra & Anr.) need not be referred to. It is well settled that a transaction of the present nature may have both shades viz., an element of criminality as well as purely civil obligation. Merely because it has a civil obligation, does not mean that the criminal element of it should not be pressed. On this

settled principle I have perused the present complaint and the materials necessary for disposing of the Discharge application. Applying these principles, the Courts below have considered the present case and having found that their conclusion is not vitiated by any apparent error and is also not perverse, the same does not require my interference.

9. Accordingly writ petition is dismissed.

(S.C.DHARMADHIKARI, J)